UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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BRENDA PICKERN,

Plaintiff,

v.

BEST WESTERN TIMBER COVE LODGE MARINA RESORT, et al.,

Defendants.

NO. CIV. S-00-1637 WBS/DAD

MEMORANDUM AND ORDER

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Plaintiff brings this action alleging violations of Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and various California statutes. Defendants now move for summary judgment on all of plaintiff's claims.

I. Background

Plaintiff is a person with disabilities who requires a wheelchair for mobility. (Pickern Decl. ¶ 1.) Defendants allegedly own and operate the Best Western Timber Cove Lodge in Lake Tahoe ("Timber Cove"), a 262 room hotel which was constructed in 1973. (Maloff Decl. ¶¶ 1,2; Steneberg Dec. ¶¶

17,18, 20-22, Ex. O, P, R, S, T; Maloff Depo. at 8; Karadanis Depo. at 8-9; Def's Reply at 11.) In 1997, plaintiff visited Timber Cove, where she allegedly encountered a number of barriers that made it difficult or impossible for her to use facilities such as the pool, laundry room, restaurant, ice machine, and restrooms. (Pickern Decl. ¶ 4; Pickern Depo. at 30-32, 38, 40, 51-52, 54, 55.) In August of 1999, plaintiff returned to Timber Cove and allegedly encountered many of the same barriers to access. (Pickern Decl. ¶ 5.) Plaintiff sued defendants in July of 2000, seeking injunctive relief under the ADA, and damages under the California Disabled Persons Act, Cal. Civ. Code § 54 et seq., the Unruh Civil Rights Act, Cal. Civ. Code § 51, et seq., and California Health & Safety Code § 19955, et seq.

Meanwhile, defendants entered into a settlement agreement with two other disabled individuals who had sued under the ADA alleging that there were barriers to access at Timber Cove. Pursuant to the settlement agreement, defendants made improvements to Timber Cove in an attempt to bring it into compliance with federal access codes. (Maloff Decl. ¶ 3, Ex. A.) Defendants also attempted to correct the problems that plaintiff had identified. (Maloff Decl. ¶¶ 5, 6, 8-10, 12.) Plaintiff alleges that despite the extensive improvements defendants have made to Timber Cove, rooms 315 and 318 at the lodge still do not comply with ADA requirements. (Francovich Decl. ¶¶2,3; Sarantschin Decl. ¶ 6, Ex. A.)

Defendants now bring this motion for summary judgment, arguing that (1) plaintiff's ADA claims are moot; (2) plaintiff lacks standing; (3) plaintiff's claims are time-barred; (4) the

individual defendants should be dismissed; (5) the court should decline jurisdiction over the state claims; and (6) plaintiff cannot prove she is entitled to relief under state law. The court finds that all of plaintiff's claims survive this motion for summary judgment except for her third claim for relief under California Health and Safety Code § 19955.

II. Discussion

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

A. Mootness

A claim for injunctive relief is moot if "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." Friends of the Earth, Inc. v. Laidlaw Enviornmental Services, 528 U.S. 167, 190 (2000).

Defendants bear the "formidable burden" of showing that plaintiff's claim is moot. Id. Defendants contend that they have cured all of the problems plaintiff identified with Timber Cove and therefore plaintiff cannot be re-injured should she visit Timber Cove in the future. However, plaintiff has raised a material issue of fact as to whether the improvements fully comply with the ADA, and therefore her claim is not moot.

The ADA prohibits public accommodations from discriminating against disabled individuals. 42 U.S.C. § 12182(a). Failure of newly constructed or altered buildings to abide by the construction guidelines set forth in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"), 28 C.F.R. § 36 et seq., violates the ADA. 42 U.S.C. § 12183(a)(1). Less rigorous standards are imposed on facilities such as Timber Cove which were constructed before the ADA's enactment in 1990. These "existing facilities" are required to remove architectural barriers that deny access to persons with disabilities, "where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).

Although the ADAAG sets out the construction requirements for new and altered facilities, it also provides "valuable guidance for determining when existing facilities contain architectural barriers" that must be removed where readily achievable. Access Now v. South Florida Stadium Corp., 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001)(quoting Pasuitti v. New York Yankees, 87 F. Supp. 2d. 221, 226 (S.D. N.Y. 1999.) In fact, the implementing regulations promulgated by the Department of Justice treat any element in an existing facility that does

not meet or exceed the ADAAG standards as a barrier to access. Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1086 (D. Haw. 2000); see 28 C.F.R. §§ 36.304(d), 36.402(b)(2)("measures taken to comply with the barrier removal requirements . . . shall comply with the applicable requirements for alterations," which are set forth in the ADAAG); U.S. Department of Justice, Supplemental Commentary to the Final Regulations, 56 Fed. Reg. 34, 544 (1991)("Section 36.304(d) requires that measures taken to remove barriers under § 36.304 be subject to [the] requirements for alterations. . . . It only permits deviations from [those] requirements when compliance with [them] is not readily achievable . . . .")

The ADAAG requires facilities with between 201 and 300 rooms to provide seven (7) accessible rooms, and an additional three (3) rooms equipped with roll-in showers. 28 C.F.R. §36.402, Appendix A at 9.1.2. The accessible rooms must have bathrooms with "a clear space of 60 inches diameter or a T-shaped space" 60 inches across the top of the T, and 60 inches from the bottom of the T to the top. Id. at 4.2.3, 4.23.3.

Timber Cove has 262 rooms and is therefore subject to the above requirements. According to plaintiff's expert witness, two of the seven rooms that defendants represent as being ADA compliant - rooms 315 and 318 - do not have enough floor space in the bathroom to meet the ADAAG's dimensional requirements for unobstructed turning space.[1] (Sarantschin Decl. ¶ 6, Ex. B.)

[1] Defendants object that the testimony of plaintiff's expert lacks foundation. Plaintiff's expert based his opinions on measurements submitted to him by Thomas Frankovich, who

Defendants' expert does not disagree with this assessment. According to his calculations, the floor space in these bathrooms is "off by an inch or two." (Gattis Decl. ¶ 3.) In fact, the bathrooms of rooms 315 and 318 come approximately 60 square inches short of the ADAAG requirements, and fit neither the circular nor the T-shaped spacial requirements.

Defendants argue that they are nevertheless entitled to summary judgment because a disabled individual, John Baudendistel, was able to maneuver his wheelchair with ease in these bathrooms. (Baudendistel Decl. ¶¶ 4-7.) While Baudendistel's testimony is probative on the question of whether Rooms 315 and 318 are fully accessible, it is by no means conclusive on this point, especially given the fact that the bathrooms deviate from the ADAAG requirements. Whether barriers to access continue to exist at Timber Cove is ultimately a question of fact to be decided at trial. Because a reasonable juror could find that there are still architectural barriers at Timber Cove, it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." Friends of the Earth, 528 U.S. at 190.

Genuine issues of fact also exist as to whether the removal of these architectural barriers would be readily achievable. The ADA defines "readily achievable" as "easily

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attests to having personal knowledge of the dimensions of Room 315 and 318. (Sarantschin Decl. ¶ 5; Frankovich Decl. ¶ 2.) Accordingly, his testimony meets the requirements of Federal Rule of Evidence 703, which permits an expert to base his testimony of facts or data "made known to the expert at or before the hearing." Fed. R. Evid. 703. Defendants' objection is overruled.

accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9). Factors to be considered in making this determination include: (1) the nature and cost of the action; (2) the overall financial resources of Timber Cove and defendants; (3) the type of operations of defendants, including the composition, structure, and functions of the workforce, and the administrative or fiscal relationship between Timber Cove and defendants. 42 U.S.C. § 12181(9).

Plaintiff's expert proposes that the requisite floor space in the bathrooms of rooms 315 and 318 can be achieved by removing the existing bathtubs and replacing them with prefabricated roll-in showers. (Sarantschin Decl. ¶ 6, Ex. A.) This would require removal and reinstallation of bathroom tile and fixtures, the placement of a waterproof floor pan, and perhaps the relocation of plumbing pipes. Further, in addition to purchasing roll-in showers at a cost of approximately two thousand dollars a piece, defendants would be required to discard the existing bathtubs, which cost $1,736 each. (Steneberg Decl. ¶¶ 15, 16.)

Although these improvements would be costly, whether defendants can shoulder these costs is a question of fact for the jury. Plaintiff's evidence shows that defendants recently installed roll-in showers in five guest rooms at Timber Cove, and were able to afford spending $1,736 to install the existing bathtubs in Rooms 315 and 316. (Francovich Decl. ¶¶ 1, 2; Steneberg Decl. ¶ 15.) From this evidence, a reasonable trier of fact could infer that installing roll-in showers in rooms 315 and 318 is readily achievable.

Defendants submit that a building official who reviewed the plans for modifying rooms 315 and 318 stated that "it would have created an unreasonable hardship on the property owner to redesign the existing structure to fully comply with the accessibility requirements of the [California Building] code." (Maloff Decl. Ex. Q.) However, the building official's opinion does not resolve the issue. First, he was interpreting the California building code, not the ADAAG;[2] second, he merely "assumed" that full compliance would be unduly burdensome without actually investigating the issue. Because material issues of fact exist as to (1) whether architectural barriers at Timber Cove still exist, and (2) whether the removal of those architectural barriers would be "readily achievable" if the court were to issue an injunction, plaintiff's request for injunctive relief is not moot.

B. Standing

Article III limits the jurisdiction of the federal courts to "cases" and "controversies." Accordingly, the Supreme Court has developed a three-prong test to determine whether the plaintiff has standing to sue pursuant to this constitutional requirement. The plaintiff must show (1) actual or threatened

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[2] The portions of the California building codes that defendants' expert examined are identical to the ADAAG. Compare 28 C.F.R § 36.402, Appendix A at 4.16, 4.20 with 24 C.C.R. §§ 1115B.7.1.2, 1115B.6.1.1. However, defendants' expert appears to have considered only the clear floor space requirements for bathtubs and toilets. He makes no mention of the requirement for unobstructed turning space, which is set forth in section 4.23.3 and 4.2.3 of the ADAAG. The ADAAG requires a structure to comply with the floor space requirements for toilets and bathtubs as well as the requirement for unobstructed turning space in bathrooms.

injury (2) that is caused or threatened to be caused by defendants' illegal conduct and (3) that is redressable by the relief sought. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Where a plaintiff seeks injunctive relief, she must also show a real and immediate threat of future injury. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Nelson v. King County, 895 F.2d 1248 (9th Cir. 1990)(requiring a "very significant possibility" that future harm will ensue).

Defendants first argue that plaintiff has no standing because she never visited rooms 315 and 318. However, even the case law cited by defendants expressly rejects this argument. See Steger v. Franco, 228 F. 3d 889 (8th Cir. 2000). In Steger, the Eighth Circuit held that a disabled plaintiff "need not encounter all [existing] barriers to obtain effective relief," so long as the plaintiff encountered some barrier to access when visiting the facility. Id. at 894. The plaintiff had standing even though the particular barrier he encountered had been remedied. Id.; see also Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 762 (D. Or. 1997)(ordering injunctive relief for entire arena although "it is unlikely that any individual plaintiff will ever sit in each of the seats . . ., or use each of the restrooms, or attempt to reach each of the ketchup dispensers"). The Sixth Circuit noted:

> To hold otherwise would be piecemeal compliance. To compel a building's ADA compliance, numerous [disabled] plaintiffs, each injured by a different barrier, would have to seek injunctive relief as to the particular barrier encountered until all barriers had been

removed. This not only would be inefficient, but impractical. Id.

This case is indistinguishable from Steger. Like the plaintiff in Steger, plaintiff seeks relief from barriers to access that she did not personally encounter; like the plaintiff in Steger, she has standing to do so.

Defendants next argue that plaintiff cannot show re-injury is sufficiently likely to occur. However, plaintiff states in her declaration that she frequently visits the Lake Tahoe area and would like to stay at Timber Cove the next time she returns. (Pickern Decl. ¶¶ 6.) In the likely event that plaintiff returns to Timber Cove, a "credible threat" of future injury exists, given that two of the seven disabled access rooms are not fully compliant. Plaintiff may encounter a situation in which the only disabled access rooms available are rooms 315 or 318, especially if plaintiff visits during the tourist season. There is no guarantee that the other five disabled access rooms will be available, even if plaintiff attempts to make a reservation in advance. Accordingly, plaintiff has standing to seek injunctive relief.

C. Statute of Limitations and Laches

The statute of limitations for bringing a claim under the ADA, the California Disabled Persons Act, or the Unruh Act is one year. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985); West Shield Investigations v. Superior Court, 82 Cal. App. 4th 935 (2000); Cal Code Civ. Proc § 340(3). Plaintiff filed this action on July 31, 2000, which is within a year of the alleged discrimination that took place during plaintiff's August 1999

visit to Timber Cove.

Defendants contend that the statute of limitations began to run in 1997, when plaintiff first visited the lodge and encountered barriers to access. However, plaintiff does not bring this claim on the basis of the injuries she allegedly suffered in 1997. The claim is based entirely on the 1999 visit. (See Pl's Compl. ¶ 39.) The fact that plaintiff was allegedly injured in 1997 is irrelevant to the statute of limitations.[3]

In their reply brief, defendants argue for the first time that under the "discovery rule," plaintiff's cause of action accrued in 1997 when she first became aware that Timber Cove did not comply with the ADA. The "discovery rule," applied in property disputes, states that the statue of limitations begins to run at the time the plaintiff discovered or should have discovered the condition of the property that forms the basis for the lawsuit. Greenberb v. Du Bain Realty Corporation, 27 Cal. App. 2d 111 (1983); Catherine Holthouse Mangini b. Aerojet-General Corp. 230 Cal. App. 3d (1991)(applying discovery rule in an action between property owners and lessees for hazardous waste contamination); Haley v. Santa Fe Land Improvement Co., 5 Cal. App. 2d 415 (1935)(applying discovery rule in claim alleging fraud regarding the condition of real property). Claims under the ADA and the Unruh Act, are properly characterized as personal

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[3] Defendants rely on a backwards interpretation of the continuing violations doctrine, which in some circumstances permits a plaintiff to rely on acts of discrimination occurring outside the statutory period to prove an ongoing violation of her rights. Defendants flip the analysis, arguing that plaintiff cannot rely the violations occurring in 1999 to prove a claim that accrued in 1997.

injury actions, not property disputes. Wilson, 471 U.S. at 280. A personal injury action accrues when the wrongful act (in this case the denial of access in 1999) takes place. Teresmer v. Barke 86 Cal. App. 3d 656 (1978). Defendants cite no cases, and the court is aware of none, that apply the "discovery rule" to ADA actions. Therefore, plaintiff's claim is timely.

Next, defendants argue that the equitable doctrine of laches bars plaintiff's claim. To establish laches, defendants must prove both an unreasonable delay by plaintiff and prejudice to themselves. Costello v. United States, 365 U.S. 265, 282 (1961). Plaintiff states in her declaration that when she was at Timber Cove in 1997 she complained about the access problems to an assistant manager, who told plaintiff she would see what could be done. (Pickern Decl. ¶ 4.) The court cannot say that plaintiff's failure to take legal action promptly after her visit in 1997 was unreasonable, since plaintiff was entitled to rely on the assistant manager's apparent willingness to see if the issue could be resolved informally. Moreover, the court fails to see why defendants are prejudiced by having to defend the lawsuit now as opposed to 1997. Therefore, the court declines to apply the doctrine of laches as a bar to plaintiff's action.

D. Individually Named Defendants

In addition to Timber Cove, the complaint names Robert and Lisa Maloff, and George and Elsie Karadanis as defendants. These individuals contend that they are not liable under the ADA because they do not have the power to make decisions about disability access at Timber Cove. (See Maloff Decl. ¶ 13: "Timber Cove is responsible for making decisions and taking

action regarding disabled access. Neither I, my wife, George or Elsie Karadanis has any power or control on an individual basis to make disabled access matters.")

Section 302 of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Plaintiff has presented ample evidence that the individually named defendants own and operate Timber Cove. In his declaration, Maloff admits that he is part owner of Timber Cove, and is the managing partner responsible for the lodge's operations. (Maloff Decl. ¶¶ 1,2.) The grant deed to the property names Robert and Lisa Maloff as holding an undivided one half interest as husband and wife, with George and Lisa Karandis holding the other half. (Steneberg Decl. ¶ 17, Ex. O.) Maloff and Karandis confirmed their ownership interest in Timber Cove in their depositions, and Maloff testified that he and Karandis participate in the day to day operation of the lodge. (Maloff Depo. at 8-9; Karandis Depo. at 5.) Other evidence includes: (1) a state board of equalization sales and use tax permit issued in the name of Robert Maloff bda HKM Timber Cove Lodge; (2) a lease agreement between Robert Maloff and George Karandis dba Timber Cove Lodge and First Resorts Hotel and Restaurant Services of Lake Tahoe; and (3) a liability insurance policy issued to Robert Maloff and George Karandis dba Timber Cove Lodge. (Steneberg Decl. ¶¶20-22, Ex. R-T.) This evidence is sufficient to raise a material issue of fact not only as to whether the individually

named defendants owned and operated Timber Cove, but also as to whether they were responsible for making decisions about disabled access.

E. Jurisdiction Over State Law Claims

Plaintiff asks the court to dismiss the state law claims because they involve unresolved questions of state law that should be remanded to state court. This argument fails for two reasons. First, this court has federal question jurisdiction to hear the state claims. Second, the state law issues before the court are neither extremely complex nor entirely unresolved.

1. Federal Question Jurisdiction

Federal question jurisdiction exists where "one or more of the state law claims necessarily turns on the construction of a substantial, disputed federal question." Rains v. Criterion Systems, Inc., 80 F.3d 339, 343 (9th Cir. 1996). Thus, "a case might . . . 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 13 (1983).

Here, two of plaintiff's three state law claims depend on whether plaintiff can establish that defendants violated the provisions of the ADA. Plaintiff brings state claims under the California Disabled Persons Act and the Unruh Civil Rights Act, both of which prohibit discrimination against persons with disabilities. Cal. Civ. Code § 54 et seq; Cal. Civ. Code § 51 et seq. After the ADA was passed in 1990, both statutes were amended to provide that a violation of the ADA

constitutes a violation of their provisions. Cal. Civ. Code §§ 51(f); 54.1(d)(amended in 1992 and 1994 respectively). Thus, a plaintiff whose rights are violated under the ADA may now seek damages under the California statutes. Boemio v. Love's Restaurant, 954 F. Supp. 204, 208-09 (S.D. Cal. 1997); Presta v. Peninsula Corridor Joint Powers Bd., 16 F. Supp. 1134, 1135 (N.D. Cal. 1998). California courts interpret the amendments to these acts "as acknowledgment by the Legislation of its intent that [the state disability statutes] impose at least the same requirements as are imposed by the Americans with Disabilities Act (the ADA)." Hankins v. El Torito Restaurant, Inc., 63 Cal. App. 4th 510 (1998).

The incorporation of the ADA into state law does not necessarily require a showing that the ADA was violated. Under the state statutes, a plaintiff can show either that the ADA was violated, or that the facility in question does not comply with the California Building Code requirements for disabled access, which are commonly referred to as "Title 24". See Cal. Civ. Code § 54 ("individuals with disabilities have the same right as the general public to full and free use of . . . public places . . . subject only to the conditions of limitations established by law, or state or federal regulations. . . .") (emphasis added); Cal. Health & Safety Code § 19955; Cal. Code Regs Title 24 § 1134B.1, 2. Under the uncontroverted facts in this case, however, plaintiff's state claims cannot succeed unless she can prove an ADA violation.

Title 24 is more lenient than the ADA. It requires compliance with the disabled access standards only if a public

accommodation is newly constructed or structurally altered. Buildings existing at the time of Title 24's enactment in 1982 are exempt from compliance unless "alterations, structural repairs or additions are made to such buildings or facilities. . . ." Cal. Code Regs Title 24 § 1134B.1, 2. The ADA has no such triggering requirement. It imposes an affirmative duty on all existing facilities to remove architectural barriers if their removal is readily achievable. 42 U.S.C § 12182(b)(2)(A)(iv).

Timber Cove predates both the enactment of Title 24 and the ADA, and is therefore an "existing facility" for purposes of both statutes. Because it is uncontroverted that no alterations, structural repairs or additions have been made to Timber Cove since it was constructed in 1973, it is exempt from the requirements of Title 24. (See Def's Mot. Summ. J. at 18-20; Maloff Decl. ¶ 2.) Consequently, the only legal theory open to plaintiff on her state claims is that architectural barriers at Timber Cove violate the ADA. Because the resolution of plaintiff's state law claims "necessarily turns on the construction of a substantial, disputed federal question," this court has federal question jurisdiction over the state law claims. Rains 80 F.3d at 343 (9th Cir. 1996).

2. Complicated State Law Issues

Even if federal question jurisdiction did not exist, the issues of state law that remain to be decided are not so complicated that this court would decline to exercise pendent jurisdiction over the state claims. See Gray v. First Winthrop Corp., 776 F. Supp. 504, 509 (N.D. Cal. 1991)(where state law claims involve undecided issues of state law, the claims are

"better left to the state court to decide").

Defendants proffer five examples of complicated state law issues that this court would have to resolve if it were to retain jurisdiction over the state law claims. (Def's Mot. Summ J. at 10-11.) The first four relate to the interpretation of Title 24, which as discussed above is inapplicable to plaintiff's case. The fifth raises the issue of whether plaintiff can recover damages for each day she was deterred from visiting the facility under California law. (Id.) Although the question remains unsettled as a matter of state law, federal courts have not hesitated to rule on this issue. See Arnold v. United Artists, 866 F. Supp. 433, 439 (1994); Botosan v. Fitzhugh, 13 F. Supp. 2d. 1047 (S.D. Cal. 1998). In fact, this court recently found that daily damages could be recovered under the state statutes in question. Loskot v. Lulu's Restaurant, No. Civ. S-00-1497 WBS PAN (E.D. Cal. 2000). This issue is not so complex that this court would decline to exercise its pendent jurisdiction over the state claims.

E. Unruh Act and California Disabled Persons Act

Defendants argue that they are entitled to summary judgment because plaintiff cannot succeed on her state law claims as a matter of law. If the amendments to the Unruh Act and the California Disabled Person's Act that incorporated the ADA into state law had never been passed, defendants would have been correct. Until the state statutes were amended in 1992 and 1994 respectively, a plaintiff had to show that the facility was in violation of Title 24, and that the discrimination she experienced was intentional. Marsh v. Edwards Theaters, Inc., 64

Cal. App. 3d 881 (1976)(holding that a defendant can not be liable under Civil Code § 54 et seq. absent a violation of an applicable building code regulation); Harris v. Capital Growth Investors, 52 Cal. 3d 1142, 1175 (1991)(requiring a plaintiff to plead a prove intentional discrimination to recover under the Unruh Act.) Here, it is undisputed that Timber Cove is exempt from Title 24, and that defendants did not intentionally discriminate against plaintiff. (Pl's Statement Disputed Facts ¶¶ 8-12.)

The ADA, however, does not contain an exemption for existing facilities. In addition, a plaintiff does not have to prove intentional discrimination to establish that her rights under the ADA were violated. See Helen L. v. DiDario, 46 F.3d 325, 335 (3rd Cir. 1995); Presta,16 F. Supp. 2d at 1136 ("[The ADA] guards against both intentional discrimination and simple exclusion from services resulting not from intentional discriminatory acts, but rather from inaction, thoughtlessness, or equal treatment when particular accommodations are necessary"); Parr, 96 F. Supp. 2d at 1084. The California legislature, by incorporating the full expanse of the ADA into the Unruh Act and the Disabled Persons Act, also incorporated these standards. See Hankins, 63 Cal. App. 4th 510 ("authority regarding the scope of the ADA is probative of the intended scope of [the state statutes].") Intentional discrimination is no longer a prerequisite to liability under these statutes. See Presta, 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998)(holding that in light of the amendment incorporating the ADA into the Unruh Act a plaintiff need not prove intentional discrimination); Parr,

96 F. Supp. 2d at 1084(same).[4] Therefore, the fact that plaintiff cannot prove intentional discrimination is of no consequence. Because plaintiff survives summary judgment on her ADA claim for the reasons set forth above, she also survives summary judgment with respect to her claims under the Unruh Act and the California Disabled Persons Act.

F. Damages

Defendants argue that even if plaintiff can maintain a claim under these statutes, she cannot recover damages. Defendants contend that because a plaintiff can only recover injunctive relief on a Title III ADA claim against a private party, a plaintiff is not permitted to recover damages under the California statutes if the basis for her claim thereunder is a violation of the ADA.[5]

The language of the Unruh Act and the California Disabled Persons Act, however, support the opposite conclusion. Section 52 of the California Code states, "[w]hoever . . . makes any discrimination or distinction contrary to Section 51 or 51.1, is liable for each and every offense for the actual damages and any amount that may be determined by [the factfinder]" up to a specified amount. Similarly, Section 54.3 states, "Any person .

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[4] The court is unaware of any California case decided after the amendments to these statutes that has ruled on the issue of whether a plaintiff must prove intentional discrimination or a violation of Title 24 to prevail on a state claim for disability discrimination.

[5] Defendants appear to be making something akin to a preemption argument - i.e., because Congress provided only for injunctive relief, it preempted state law remedies for ADA violations. However, defendants do not phrase their argument in terms of preemption, and cite no case law to support a preemption theory.

. . who denies or interfere with admittance to or enjoyment of the public facilities as specified in Section 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Section 54, 54.1 and 54.2 is liable for each offense for the actual damages and any amount as may be determined by [the factfinder]" up to a specified amount.

There is nothing in the language of these statutes that draws a distinction between a plaintiff who prevails through showing a violation of Title 24 and a plaintiff who prevails by proving the barrier access requirements of the ADA were violated. The right to recover damages is the same regardless of the how the California statute was violated. Therefore, plaintiff may recover damages under these statutes for ADA violations. Boemio, 954 F. Supp. at 208-09; Presta, 954 F. Supp. at 1135.

G. Health and Safety Code § 19955

Plaintiff's third cause of action alleges violations of California Health and Safety Code § 19955. Section 19955 requires all public accommodations or facilities constructed with private funds to comply with California Government Code §§ 4450-4460. Cal. Health & Safety Code § 19955 (West 2001); see generally City and County of San Francisco v. Grant Co., 181 Cal. App.3d 1085 (1986); People Ex Rel. Deukmejian v. CHE, Inc., 150 Cal. App.3d 123 (1983); Marsh v. Edwards Theater Circuits, Inc., 64 Cal. App.3d 881 (1976). Government Code Section 4450 in turn refers to Title 24 of the California Code of Regulations as the source of the relevant building standards for places of public accommodation. Cal. Gov't Code §§ 4450, 4451(d)(West 2001)(referencing the California Building Standards Code and

regulations such as Title 24 developed by the State Architect and adopted by the California Building Standards Commission.) Because defendants have made no alterations, structural repairs or additions to Timber Cove since its construction in 1973, they are exempt from adhering to the standards proscribed in Title 24, and consequently from liability under Health and Safety Code Section 19955.[6]

IT IS THEREFORE ORDERED that:

(1) Defendants' motion for summary judgment be, and the same hereby is, GRANTED with respect to plaintiff's claim under California Health and Safety Code § 19955; and

(2) in all other respects, defendants' motion for summary judgment be, and the same hereby is, DENIED.

DATED: January 17, 2002

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[6] Plaintiff does not address defendants' argument that her claim under section 19955 should be dismissed. She appears to concede the point by arguing, in connection with the jurisdictional question, that Title 24 does not apply to Timber Cove.

United States District Court
for the
Eastern District of California
January 18, 2002

* * CERTIFICATE OF SERVICE * *

2:00-cv-01637

Pickern

v.

Best Western Timber

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on January 18, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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